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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT FITCH, Acting Superintendent of
Greene Correctional Facility,

Petitioner,

—v.—

SEAN EARLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 25, 2007

QUESTIONS PRESENTED

1. Whether, on habeas review, an adjudication of a claim on the merits by a state court can be "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1), when (a) this Court, in the decision contrary to which the state court is said to have acted—*Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936)—did not announce that the rule of law it was establishing was based on the Federal Constitution (or on other federal law binding on the States in criminal proceedings), and when (b) regardless of whether this Court must be the court to announce the constitutional basis of the rule, the decision of this Court contrary to which the state court is said to have acted does not clearly appear to be based on the Constitution (or on other federal law binding on the States in criminal proceedings), but rather, appears to be based on authority not binding on the States in criminal proceedings.

2. Whether, in light of this Court's decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006), the Second Circuit incorrectly identified the specific holding of the decision in *Wampler*—even assuming that *Wampler* was based on the Constitution—where the Second Circuit disregarded a circumstance essential to the decision in *Wampler*, namely, that, in that case, the imposition of the penalty at issue was committed to the discretion of the sentencing court; and whether the state court's determination in this case—that a defendant may properly be subjected to a component of a sentence that, by state statute, is mandatory and included in the sentence, even if that component of the sentence was not expressly pronounced by the court at the sentencing proceeding—therefore was not "contrary to" *Wampler* within the meaning of 28 U.S.C. § 2254(d)(1).

PARTIES TO THE PROCEEDING

The petitioner in this Court is Robert Fitch, the Acting Superintendent of the Greene Correctional Facility, which is the state prison where Sean Earley is incarcerated. Mr. Fitch is represented in this federal habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York. The respondent in this Court is Sean Earley, who, having been convicted of attempted burglary in New York State court, filed the federal habeas corpus petition that is the subject of this litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert Fitch, Acting Superintendent of Greene Correctional Facility in New York (hereafter "the State"), requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that vacated a judgment of the United States District Court for the Eastern District of New York (Korman, C.J.) and remanded the case to that court for further proceedings to determine whether Sean Earley's petition for a writ of habeas corpus had been timely filed. The district court, without addressing the timeliness issue, had denied the petition for a writ of habeas corpus on the merits, holding that the failure of the state court to inform Earley (hereafter, "the defendant" or "Earley"), either at the time of his guilty plea or at the time of his sentencing, that his bargained-for sentence of six years' incarceration would, by the mandatory terms of New York statutory law, include a five-year period of post-release supervision (*see* N.Y. Penal Law §§ 70.00[6], 70.45[1]), did not require, as a matter of federal constitutional law, that the post-release supervision component of the sentence be excised from Earley's sentence.

Opinions Below

The citation of the first opinion of the United States Court of Appeals for the Second Circuit is *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006). The citation of the opinion of the Second Circuit that denied panel rehearing of the appeal is *Earley v. Murray*, 462 F.3d 147 (2d Cir. 2006). The opinions of the United States District Court for the Eastern District of New York and the

opinion of the New York Supreme Court, Kings County, are unreported. Each of the above decisions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 9, 2006. By papers filed June 22, 2006, the State petitioned the Second Circuit for rehearing en banc and panel rehearing of this case. By opinion dated August 31, 2006, the three-judge panel that had issued the June 9, 2006 opinion denied the petition for rehearing. The opinion of the three-judge panel dated August 31, 2006 did not address the State's petition for rehearing en banc. By order dated November 27, 2006, the Second Circuit denied the petition for rehearing en banc and panel rehearing. This petition for certiorari was filed within the time specified by the order dated February 12, 2007, of the Honorable Ruth Bader Ginsburg, Associate Justice of this Court, which extended the time for the State to file the petition to and including April 26, 2007.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 United States Code § 2254:

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

New York Penal Law § 70.45:

Determinate sentence; post-release supervision.

1. In general. Each determinate sentence also includes, as a part thereof, an additional period of post-release supervision. Such period shall commence as provided in subdivision five of this section and a violation of any condition of supervision occurring at any time during such period of post-release supervision shall subject the defendant to a further period of imprisonment of at least six months and up to the balance of the remaining period of post-release supervision, not to exceed five years. . . .

2. Period of post-release supervision. The period of post-release supervision for a determinate sentence shall be five years . . . .[1]

3. Conditions of post-release supervision. The board of parole shall establish and impose conditions of post-release supervision in the same manner and to the same extent as it may establish and impose conditions . . . upon persons who are granted parole . . . .

STATEMENT OF THE CASE

Introduction

In 1999, the defendant was charged by a Kings County, New York indictment with burglary and other, lesser crimes. The defendant subsequently agreed to plead guilty to attempted burglary, in exchange for a prison sentence of six years. At the plea proceeding, the court did not advise the defendant on the record that, as a condition of the plea, the defendant's six-year prison sentence also would include, by operation of law (N.Y. Penal Law §§ 70.00[6], 70.45), a five-year term of post-release supervision (sometimes hereafter, "PRS"). When the defendant appeared for sentencing on February 29, 2000, the court imposed the bargained-for sentence of

[1] New York Penal Law § 70.45 was enacted in 1998. *See* Act of Aug. 6, 1998, ch. 1, § 15, 1998 N.Y. Laws 1, 5-6. Subdivision 2 of the statute, still in effect at the time of Earley's crime, specified circumstances when the court could impose a term of post-release supervision of less than five years. *See Gilbert Criminal Law and Procedure 1999*, N.Y. Penal Law former § 70.45(2) (Matthew Bender 1999). None of those circumstances is applicable to this case. Subdivision 2 was amended in 2004. *See* Act of Dec. 14, 2004, ch. 738, § 35, 2004 N.Y. Laws 1462, 1478-79. The amendments are not relevant to this case. *See* N.Y. Penal Law § 70.45(2)(a)-(f) (McKinney Supp. 2007).

six years in prison. The sentencing court did not announce at sentencing that the defendant's sentence of imprisonment also included the five-year term of PRS.

More than one year after his incarceration had begun, the defendant moved in the sentencing court, pursuant to New York Criminal Procedure Law § 440.20, for the five-year term of post-release supervision to be stricken from his sentence, on the ground that that term was not part of the plea agreement and was not announced at the sentencing proceeding. The defendant stated that he did not seek to have his plea vacated; he sought only to have the term of post-release supervision eliminated. The sentencing court denied relief.

Thereafter, the federal district court denied the defendant's petition for a writ of habeas corpus. The Second Circuit reversed, holding that the decision of the sentencing court denying the relief requested by the defendant was "contrary to" this Court's decision in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936). According to the Second Circuit, *Wampler* holds that "[t]he only cognizable sentence is the one imposed by the judge," and that "[a]ny alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect." Therefore, the Second Circuit held, the term of post-release supervision was "a nullity" and "quite simply, never a part of the sentence" (Appendix ["App."] at 7a, 10a). *Earley v. Murray*, 451 F.3d 71, 75, 76 (2d Cir. 2006). The Second Circuit observed that "[a]lthough *Wampler* does not identify the source of the rule that it announces, we believe that it is based in the due process guarantees of the United States Constitution" (App. at 9a n.1). 451 F.3d at 76 n.1.

This case presents two important and still unsettled questions concerning the proper interpretation of the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), Pub. Law No. 104-132, 110 Stat. 1214 (1996). The first question is whether, under 28 U.S.C. § 2254(d)(1), the "clearly established Federal law" upon which the state prisoner bases his claim for habeas relief must be clearly established as a rule of federal law binding on the States in criminal proceedings, *i.e.*, as a rule of constitutional law.

In this case, the Second Circuit identified with certainty what it considered to be the clearly established rule of law announced in *Wampler*—the rule that "[t]he only cognizable sentence is the one imposed by the judge"—but the Second Circuit expressed considerably less certainty about the *source* of the rule, acknowledging that the *Wampler* decision was silent on that question and stating only that the court "believe[d]" that the source of the rule was the constitutional right to due process (App. at 7a, 9a n.1). 451 F.3d at 75, 76 n.1.

An application for habeas relief under 28 U.S.C. § 2254 may be entertained "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States" (28 U.S.C. § 2254[a]), which almost invariably means that habeas relief is limited to circumstances in which State criminal proceedings violated federal *constitutional* law. Where the relevant state court rejected the prisoner's claim on the merits, the AEDPA imposes the additional requirement that the state court's rejection of the claim have been "contrary to, or [have] involved an unreasonable application of, clearly established Federal law, as determined by [this Court]." Accordingly, it should follow that for habeas relief to be granted, the rule of law providing the ground for relief must be clearly established by this Court as a rule of federal constitutional law. The decision of the Second Circuit in this case seems to rest, however, on the premise that, so long

as the rule of law is clearly established, it does not matter whether the constitutional basis of the rule is also clearly established. Thus, this case presents this Court with the opportunity to address this fundamental question concerning the proper interpretation of 28 U.S.C. § 2254(d)(1): whether "clearly established Federal law" means that the law at issue must be clearly established *as* federal law that is binding on the States in criminal proceedings.

This case also presents the related and equally important question of whether a lower federal court may decide for itself, without a pronouncement from this Court, that the source of a rule of law *is* the Federal Constitution. As the Second Circuit recognized, the *Wampler* decision does not refer to any constitutional provision. Inasmuch as 28 U.S.C. § 2254(d)(1) provides that a state prisoner is entitled to habeas relief only upon a showing that the relevant state court made a ruling that was contrary to or involved an unreasonable application of clearly established federal law "as determined by the Supreme Court of the United States," it should follow that only this Court may make the determination that the rule of law at issue is of constitutional dimension.

Finally, assuming that a lower federal court is empowered to decide for itself that a rule of law announced by this Court is a rule of constitutional law, even when this Court did not say that it was, then this case presents the question of whether the Second Circuit correctly concluded that the *Wampler* rule rested on the due process guarantees of the Constitution. *Wampler* did not explicitly hold that it was announcing a constitutional rule, and, indeed, the decision appears to rest on non-constitutional federal authority. Thus, *Wampler* apparently does not state a rule of federal constitutional law.

More generally, this case presents the question of whether, in light of this Court's subsequent decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006), the Second Circuit correctly identified the specific holding of *Wampler*. The Second Circuit disregarded a circumstance essential to the decision in *Wampler*, namely, that, in *Wampler*, the choice of whether to incarcerate the defendant for non-payment of a fine was committed to the discretion of the sentencing court. Here, by contrast, the sentencing court had no discretion whatsoever over whether to impose post-release supervision or how long a term of post-release supervision to impose; according to the New York Penal Law, a five-year term of post-release supervision was a mandatory part of the defendant's sentence. Given *Musladin's* implicit teaching that the holdings of this Court should be construed narrowly on habeas review under 28 U.S.C. § 2254, the conclusion of the Second Circuit—that the refusal of the state court, upon the defendant's motion, to eliminate the term of post-release supervision from the sentence was "contrary to" *Wampler*—is simply untenable.

The decision of the Second Circuit in this case will likely affect the validity of the post-release supervision component of hundreds, if not thousands, of sentences imposed by New York courts. *See, e.g., People v. Thompson*, No. 2002-05990, 2007 N.Y. Slip Op. 2965 (App. Div. Apr. 3, 2007); *People v. Sebastian*, No. 2005-06896, 2007 N.Y. Slip Op. 1903 (App. Div. Mar. 6, 2007); *People v. Benson*, 831 N.Y.S.2d 266 (App. Div. 2007); *People v. Smith*, 37 A.D.3d 499, 829 N.Y.S.2d 226 (App. Div. 2007) (all following *Earley*); *cf. People v. Sparber*, 34 A.D.3d 265, 823 N.Y.S.2d 405 (App. Div. 2006) (distinguishing *Earley*). Accordingly, the petition for a writ of certiorari should be granted, and, at the very least, the judgment of the Second Circuit should be vacated and the case should be remanded to that court

for further consideration in light of this Court's decision in *Musladin*.

Procedural History of This Case

A. The State Court Proceedings

The defendant was charged under New York law with burglary and other, lesser crimes, all arising out of his illegal entry into a Brooklyn home on March 30, 1999. On February 17, 2000, the defendant appeared in the New York Supreme Court, Kings County, with his attorney, and agreed to plead guilty to attempted burglary in the second degree (N.Y. Penal Law §§ 110.00/140.25[2]), a class D violent felony (*see* N.Y. Penal Law §§ 70.02[1][c], 110.05[5], 140.25), in full satisfaction of the charges against him. The court promised the defendant that in exchange for his guilty plea, he would receive a sentence of six years in prison. After an allocution of the defendant, the court accepted the defendant's guilty plea and adjudicated him a second violent felony offender. *See* N.Y. Penal Law § 70.04(1).

Pursuant to New York Penal Law §§ 70.00(6) and 70.45, the defendant's determinate sentence of imprisonment included, by operation of law, a five-year period of post-release supervision. *See* N.Y. Penal Law § 70.00(6) ("a determinate sentence of imprisonment . . . shall include, as a part thereof, a period of post-release supervision in accordance with section 70.45"); N.Y. Penal Law § 70.45(1) ("Each determinate sentence also includes, as a part thereof, an additional period of post-release supervision"); N.Y. Penal Law § 70.45(2) (mandating a five-year period of post-release supervision under the circumstances of this case). At the plea proceeding, however, the court did not explicitly inform

the defendant that his sentence would include a period of post-release supervision.

On February 29, 2000, the court sentenced the defendant to the promised term of imprisonment of six years. The court did not explicitly inform the defendant at the sentencing proceeding that his sentence would include a period of post-release supervision.

After his incarceration had begun, the defendant petitioned the New York State Department of Correctional Services to "correct" his inmate records, by removing from those records any reference to PRS. After that unsuccessful effort, the defendant, by papers dated July 11, 2002, moved *pro se* in the New York Supreme Court, Kings County, pursuant to New York Criminal Procedure Law § 440.20, to set aside his sentence. He claimed, in relevant part, that his plea was obtained in violation of due process because the court did not inform him of the post-release supervision consequence of pleading guilty. The defendant stated, however, that he wished to retain his plea. In addition, the defendant argued that post-release supervision was not a legally cognizable part of his sentence because it had not been pronounced by the court at the sentencing proceeding. Accordingly, he asked the court to vacate the sentence and to resentence him to a term of six years in prison with no post-release supervision.

By decision and order dated March 4, 2003, the state court denied the defendant's motion. The court acknowledged that a defendant ought to be informed of the post-release supervision consequence of a guilty plea, but held that because, as a matter of New York law, post-release supervision was a mandatory component of the defendant's sentence, the defendant's request that the court vacate the post-release supervision component of his sentence had to be denied (App. at 33a-35a).

The defendant subsequently filed an application for leave to appeal from the order denying his motion to set aside his sentence. By order dated May 19, 2003, the defendant's application was denied.

B. The Federal Court Proceedings

By papers dated June 17, 2003, the defendant petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As in his state court motion, the defendant stated that he wished to retain his guilty plea, and he sought from the district court an order resentencing him to six years in prison with no post-release supervision. Concerning the timeliness of his petition, the defendant argued that the benchmark date for determining whether the petition was timely was October 5, 2001, when, according to the defendant, he first learned about post-release supervision from fellow inmates whom he overheard discussing PRS.

By memorandum and order dated December 31, 2003, the district court denied the petition as untimely and, in any event, without merit (App. at 20a-21a). Subsequently, the defendant moved for rehearing, stating that the court had decided the case before he had had an opportunity to reply to the State's answer to the petition. In a memorandum and order dated June 18, 2004, the district court granted the defendant's motion for rehearing and reconsidered its rulings both on the timeliness issue and on the merits of the defendant's claim. Following reconsideration, the district court again denied the petition (App. at 22a-23a).

The district court concluded that it should not have resolved the timeliness issue without a hearing, but that the court's alternative basis for its ruling—that the petition was without merit—made a hearing unnecessary.

The district court noted that although the decision of this Court in *Santobello v. New York*, 404 U.S. 257 (1971), states that a defendant has a constitutional right to relief for a breach of a promise in a plea agreement (here, the promise that his sentence would be six years in prison and nothing more), *Santobello* does not clearly mandate a particular remedy where the promise is "unfulfillable" in the sense that it is a commitment to produce a result not authorized by law or beyond the power to produce. The district court determined that "it was not unreasonable for the New York courts to conclude, under all of the circumstances, that withdrawal of [the defendant's] plea was the appropriate remedy," even though that remedy "could not have restored [the defendant] precisely to the *status quo ante*" (App. at 23a-27a).

The Second Circuit granted the defendant a certificate of appealability. On June 9, 2006, the Second Circuit vacated the judgment of the district court and remanded the case for a determination of whether the petition was timely filed (App. at 2a, 10a-11a). *Earley v. Murray*, 451 F.3d 71, 76-77 (2d Cir. 2006).

The Second Circuit declared that, following the sentencing judge's imposition of sentence in this case, it was the New York Department of Correctional Services ("DOCS") that had "administratively added" the term of post-release supervision to the defendant's sentence. The Second Circuit held that the state court, in upholding the authority of DOCS to so act, had made a determination that was "contrary to clearly established Federal law as determined by [this Court]" (App. at 3a-9a). 451 F.3d at 73-76. The Second Circuit identified this Court's decision in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), as setting forth the clearly established law, and stated that the holding of *Wampler* was that "[t]he only cognizable sentence is the one imposed by the

judge," and that "[a]ny alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect." Therefore, the Second Circuit held, Earley's term of post-release supervision was "a nullity" and "quite simply, never a part of the sentence" (App. at 7a, 10a). 451 F.3d at 75, 76.

The Second Circuit recognized that there were differences between this case and *Wampler*, in that, in *Wampler*, the decision whether to subject the defendant to imprisonment until he paid his fine (a decision made in that case by the clerk of the court) was within the discretion of the sentencing court, while, in this case, state law required that the defendant's sentence include the five-year term of PRS. The Second Circuit held, however, that the distinction was not meaningful because the "broader holding" of *Wampler*—that the only cognizable sentence is the one imposed by the judge—did not depend on whether the sentence was discretionary or mandatory (App. at 6a-7a). 451 F.3d at 74-75.

After holding that the state court's determination was "contrary to" the holding of *Wampler*, the Second Circuit went on to observe in a footnote:

> Although *Wampler* does not identify the source of the rule that it announces, we believe that it is based in the due process guarantees of the United States Constitution.

(App. at 9a n.1). 451 F.3d at 76 n.1. The Second Circuit did not explain the basis for its belief.

The State petitioned the Second Circuit for panel rehearing and rehearing en banc. The State argued that the Second Circuit had misapprehended New York law in stating that DOCS had "administratively added" the term of post-release supervision to Earley's sentence. Rather, the State noted, post-release supervision was, by statu-

tory definition, part of every determinate sentence of imprisonment. Thus, the State argued, the Second Circuit's conclusion that the period of post-release supervision was "never a part of the sentence" was incorrect as a matter of New York law.

On August 31, 2006, the State's application for panel rehearing was denied in an opinion (App. at 12a-17a). *Earley v. Murray*, 462 F.3d 147 (2d Cir. 2006). The Second Circuit stated that it made no difference to its analysis whether the sentence had been added by DOCS or whether it was added by operation of law. According to the Second Circuit, *Wampler* stands for the proposition that the only cognizable sentence is the one imposed by the judge (App. at 14a-16a). 462 F.3d at 149-50.

By order dated November 27, 2006, the Second Circuit denied the petition for rehearing en banc and panel rehearing.[2]

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[2] The first decision of the Second Circuit contains an unsupported statement of fact that apparently was based on an allegation in the defendant's *pro se* papers filed with the district court—namely, that, at the time of the defendant's plea, defense counsel, the prosecutor, and the court all were unaware of the existence of the statute mandating post-release supervision (App. at 2a). 451 F.3d at 72.

Following the remand to the district court, United States District Judge Edward R. Korman referred the matter to United States Magistrate Judge Viktor V. Pohorelsky. At a hearing conducted by the Magistrate Judge on February 26, 2007, the defendant's attorney and her supervisor both testified that, at the time of the defendant's plea, they were well aware of the post-release supervision statute (which, by that time, was more than a year old), and the defendant's attorney further testified that she routinely discussed PRS with her clients when counseling them on whether to accept a plea offer.

After the hearing, the Magistrate Judge issued a report and recommendation, dated March 14, 2007, in which he recommended that Judge Korman hold that Earley's petition was timely. The State has filed objections to the report and recommendation, and the matter is pending before Judge Korman.

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to resolve two fundamental questions concerning the correct interpretation of the phrase, "clearly established Federal law, as determined by the Supreme Court of the United States," as that phrase is used in 28 U.S.C. § 2254(d)(1). *First*, this case presents the question whether "clearly established" modifies "Federal law" or whether it merely modifies "law." *Second*—assuming that "clearly established" modifies "Federal law"—this case presents the question whether "as determined by the Supreme Court of the United States" means that this Court, as opposed to a lower federal court, must be the court that announces the federal character of the law at issue.

The decision of the Second Circuit in this case appears to interpret the phrase, "clearly established Federal law," to mean that so long as the rule of law is clearly established, it is not necessary, for habeas relief to be granted, that the rule of law be clearly established *as* "Federal law," *i.e.*, as constitutional law (or other federal law) that is binding on the States. The decision of the Second Circuit also appears to rest on the premise that the phrase, "as determined by the Supreme Court of the United States," does not require that this Court have made the determination that the rule of law at issue is a rule of federal constitutional law.

The State is seeking a writ of certiorari because this Court has not had occasion to address either of these questions, which go to the very heart of the standard of federal habeas review and which were incorrectly resolved by the court of appeals.

Additionally, the State is seeking a writ of certiorari because the decision of the Second Circuit, which pre-

ceded this Court's decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006), is incorrect in light of *Musladin*, even assuming that this Court's decision in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936)—on which the Second Circuit relied as the basis for its decision in this case—indeed constitutes clearly established federal law, within the meaning of 28 U.S.C. § 2254(d)(1). Lacking the guidance provided by this Court in *Musladin*, the Second Circuit stated the holding of *Wampler* too broadly and, as a result, erroneously held that this case was governed by *Wampler*. The Second Circuit's erroneous decision may invalidate the post-release supervision component of hundreds, if not thousands, of New York criminal sentences.

For these reasons, the State's petition for a writ of certiorari should be granted, and, at the very least, the Second Circuit's judgment should be vacated and the case should be remanded for further consideration in light of *Musladin*. *Cf. Knowles v. Mirzayance*, 127 S. Ct. 1247 (2007); *Miller v. Rodriguez*, 127 S. Ct. 1119 (2007); *Schmidt v. Van Patten*, 127 S. Ct. 1120 (2007) (all vacating decisions of courts of appeals and remanding for reconsideration in light of *Musladin*).

I. The Second Circuit's Decision Presents Two Fundamental and Unsettled Questions Concerning the Proper Interpretation of 28 U.S.C. § 2254(d)(1).

Under 28 U.S.C. § 2254(a), a federal court may grant a state prisoner habeas relief where the prisoner's custody is in violation of the Federal Constitution. A federal court also may grant a state prisoner habeas relief for a violation of federal statutory law or an international treaty (*id.*), but such relief is unavailable unless that other, non-constitutional source of law is binding on

the States in criminal proceedings. *See generally Reed v. Farley*, 512 U.S. 339 (1994). Thus, except in narrow circumstances not relevant to this case, a state prisoner may obtain habeas relief only by showing that his custody violates the Federal Constitution.

The Antiterrorism and Effective Death Penalty Act of 1996 further limits the circumstances under which a state prisoner may obtain habeas relief. Under 28 U.S.C. § 2254(d)(1)—as amended in 1996—when a state court has adjudicated the prisoner's claim "on the merits," a federal court may not grant habeas relief unless the adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This Court has held that "clearly established Federal law" refers to the holdings, as opposed to the dicta, of this Court's decisions, as of the time of the relevant state court's decision. *Musladin*, 127 S. Ct. at 653; *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

For a holding of this Court to constitute "clearly established Federal law" within the intendment of 28 U.S.C. § 2254(d)(1), not only must the rule of law be clearly established, but also, the federal character of the rule of law must be clearly established. This is so because, as a matter of the plain meaning of the words of the statute, "clearly established" modifies "Federal law," not just "law." That is the only syntactically sensible way to read the statute. But additionally, that is the only reading of the statute that is consonant with congressional intent in enacting 28 U.S.C. § 2254(d)(1).

"A prime motivating force in Congress's efforts to reform habeas corpus, culminating in AEDPA's enactment in 1996, was a desire to limit federal review to legal precepts that were binding on the state courts when

they ruled, and to keep federal courts from applying precepts of their own recent invention." 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 32.3, at 1432 n.11 (4th ed. 2001) (citing legislative history); *id.* § 32.1, at 1420 n.8 (citing cases holding that federal circuit precedent generally is not binding on state courts). Given that a state prisoner is entitled to habeas relief only upon a showing that he is in custody in violation of the Constitution (or other federal law that is binding on the states in criminal trials), it would make no sense, from the standpoint of congressional intent, for 28 U.S.C. § 2254(d)(1) to be read to require merely that the rule of law (of whatever provenance) be clearly established, when the state courts need only obey the dictates of federal *constitutional* law (or other binding federal law). To effectuate the intent of Congress, not only must the rule of law be clearly established, but the constitutional nature of the rule of law also must be clearly established.

In this case, however, the Second Circuit apparently thought that, for a state prisoner to be entitled to habeas relief, it was sufficient that the rule of law, as determined by this Court, be clearly established, regardless of whether the rule of law was clearly established as a rule of constitutional law. Indeed, after acknowledging that the source of the rule announced in *Wampler* was not identified in the *Wampler* decision, the Second Circuit went on to state, "we *believe* that [the rule] is based in the due process guarantees of the United States Constitution" (App. at 9a n.1). 451 F.3d at 76 n.1 (emphasis added).

The decision of the Second Circuit eviscerates 28 U.S.C. § 2254(d)(1). For the state courts to be bound to follow a decision of this Court, they need to be clearly on notice that the decision is binding on them. Where

even the Second Circuit cannot say with any certainty that a particular rule announced by this Court is of constitutional dimension, but instead can say only that it "believe[s]" the rule to be of constitutional dimension, then the rule does not qualify as "clearly established Federal law."

Another gross defect in the Second Circuit's decision is that the Second Circuit took it upon itself to determine that the rule at issue was in fact a rule of constitutional law. In so doing, the Second Circuit seems to have overlooked the phrase, "as determined by the Supreme Court of the United States."

Again, as a matter of the plain meaning of the words, the phrase, "clearly established Federal law, as determined by the Supreme Court of the United States," contemplates that *this* Court, and only this Court, make the determination that the rule of law at issue is a rule of federal constitutional law (or other federal law that is binding on the States in criminal trials). *Cf. Tyler v. Cain*, 533 U.S. 656, 663 (2001) (the phrase, "made retroactive to cases on collateral review by the Supreme Court," as used in AEDPA [28 U.S.C. § 2244(b)(2)(A)], means that only this Court has the authority to declare a new rule retroactive). Additionally, the phrase, "as determined by the Supreme Court of the United States," is consonant with congressional intent only if the phrase is read to mean that *this* Court must be the court to announce that the rule of law at issue is a rule of constitutional law; otherwise, the state courts would not be on notice that the rule was binding on them.

This Court did not clearly establish in *Wampler* a rule of constitutional law. As the Second Circuit acknowledged, *Wampler* did not invoke the Constitution as the source of the rule that it was announcing (App. at 9a n.1). 451 F.3d at 76 n.1. Furthermore, not a single one of the

cases that this Court relied upon in *Wampler* is based on the Constitution. And, in the almost seventy-one years since this Court decided *Wampler*, this Court has never cited *Wampler* as stating a rule of constitutional law.

Accordingly, because this case raises two basic questions about the proper interpretation of 28 U.S.C. § 2254(d)(1), and because the Second Circuit's interpretation of the statute was fundamentally wrong with respect to both questions, this Court should grant the State's petition for a writ of certiorari.

II. This Court's Decision in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), Does Not State a Rule of Constitutional Law.

Even assuming that a lower federal court is empowered under 28 U.S.C. § 2254(d)(1) to determine, in the first instance, that a rule of law announced by this Court is a rule of constitutional law, the Second Circuit erred in determining that *Wampler* was grounded in the due process guarantees of the Constitution.

To begin with, nowhere in the *Wampler* opinion did Justice Cardozo refer to the Constitution; none of the cases that Justice Cardozo cited refers to the Constitution; and none of this Court's several decisions that have cited *Wampler* have cited the case for a constitutional principle.[3] By contrast, numerous other opinions of this Court from the same era as *Wampler*, including opinions authored by Justice Cardozo, refer, without reticence, to the Constitution. *See, e.g., Morehead v. New York*, 298 U.S. 587, 609-15 (1936) (statute establishing minimum wage for female employees violated due process rights of

[3] Additionally, neither of the lower court decisions in *Wampler* mentioned the Constitution. *See United States v. Wampler*, 10 F. Supp. 609 (D. Md. 1935); *Wampler v. Hill*, 11 F. Supp. 540 (M.D. Pa. 1935).

employers); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (conviction obtained by confessions that were the product of torture violated due process); *Norris v. Alabama*, 294 U.S. 587, 589-99 (1935) (systematic exclusion of blacks from jury service denied black defendant equal protection rights guaranteed by Fourteenth Amendment); *Snyder v. Massachusetts*, 291 U.S. 97, 105-07 (1934) (Cardozo, J.) (setting forth circumstances when due process mandates defendant's presence at a criminal proceeding); *Morrison v. California*, 291 U.S. 82, 88-93 (1934) (Cardozo, J.) (petitioner denied due process by statute placing on him the burden of disproving element of offense); *cf. Lee v. Bickell*, 292 U.S. 415, 425-26 (1934) (Cardozo, J.) (affirming injunction prohibiting enforcement of state statute against complainants, but stating that it was not necessary to address constitutionality of statute, because injunction could be upheld on non-constitutional grounds).

Thus, the absence from the *Wampler* decision of any discussion of due process is strong evidence that due process was not the basis of the decision. Indeed, it appears that no court of appeals, other than the Second Circuit in this case, has ever characterized *Wampler* as a decision based on the Constitution.

Furthermore, a careful reading of *Wampler* leads to the conclusion that the decision in fact is based on federal statutory law or common law. In *Wampler*, the relator Wampler, having been convicted of federal income tax evasion, was sentenced by the Maryland federal district court to serve an eighteen-month term of imprisonment and to pay a $5,000 fine. However, the clerk of the district court—apparently acting in obedience to the long-standing instructions of the judges of the court—issued an order of commitment (a "mittimus") specifying, in addition to the terms of the sentence orally imposed by

the court, that, in the event that Wampler did not pay the fine, he would remain incarcerated until he did so. Thereafter, Wampler sought to have the condition that had been added by the clerk stricken from the order of commitment. After the sentencing court denied the relief, Wampler sought a writ of habeas corpus from the district court in the district in which he was incarcerated. That court granted the relief and the Supreme Court held that the habeas court was correct. 298 U.S. at 461-63.

One way to read *Wampler* is that the decision stands for the proposition that when the imposition of a sentence entails an exercise of discretion, then the judge (and the judge alone) must be the individual to exercise that discretion, and thus, when a clerk exercises that discretion, he acts in a judicial capacity and in excess of his authority.

Federal statutory law at the time of Wampler's sentencing provided that "*[w]here the judgment directs* that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid." *See* 18 U.S.C. former § 569 (emphasis added; cited in *Wampler*, 298 U.S. at 463). Thus, "[i]mprisonment [did] not follow automatically upon a showing of default in payment." 298 U.S. at 463. Rather, the decision whether to direct that the defendant be imprisoned for non-payment of the fine was discretionary with the court, and if the direction for imprisonment was omitted, then the remedy by execution was exclusive. *Id.* at 463-64.

Wampler states: "The choice of pains and penalties, *when choice is committed to the discretion of the court*, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the

judgment." *Id.* at 464 (emphasis added). Accordingly, on this reading of *Wampler*, because, by statute, the decision whether to continue the imprisonment of the relator for non-payment of his fine was discretionary with the sentencing judge, the clerk's exercise of this discretion was, in light of the statute, in excess of his authority and, therefore, void. *See Boyd v. Archer*, 42 F.2d 43, 43-44 (9th Cir. 1930) (cited in *Wampler;* holding that, in light of 18 U.S.C. former § 569, clerk's insertion into order of commitment of provision specifying continued incarceration until fine was paid was void).

A second possible reading of *Wampler* is that the decision was concerned merely with the formal question of which of two pieces of paper expresses the will of the court, when there is a conflict. Thus *Wampler*, on this reading, stands for the simple proposition that in any contest between the judgment of conviction (embodying the sentence pronounced by the court) and the order of commitment, regarding what the sentence is, the judgment of conviction prevails.

Wampler states: "A warrant of commitment departing in matter of substance from the judgment back of it is void. . . . The court speaks through its judgment, and not through any other medium. It is not within the power of a judge by instructions to a clerk to make some other medium the authentic organ of his will." 298 U.S. at 465. Moreover, "[a] warrant of commitment spends its force, it fulfills what is at least its primary purpose, upon delivery of the prisoner at the place of his imprisonment. When 'a prisoner is safely in the proper custody, there is no office for a *mittimus* to perform.' " *Id.* at 466 (citations omitted). This second possible reading, like the first, is not grounded in the Constitution.[4]

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[4] However, as argued below (*see infra* at 27-28), this second reading of *Wampler* is dictum.

Moreover, in *Wampler*, this Court presumably adhered to the rule that a court should not reach a constitutional issue when the case can be decided on non-constitutional grounds. *See, e.g., Lee v. Bickell*, 292 U.S. at 425; *see also Harbury v. Christopher*, 536 U.S. 403, 417 (2002); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). Accordingly, the Second Circuit should not have read *Wampler* as announcing a constitutional rule when the decision does not clearly announce one and when there are other, entirely reasonable, ways to read the decision.

In sum, the conclusion of the Second Circuit that *Wampler* was based on the due process guarantees of the Constitution is unfounded. In any event, the most that can possibly be said for the Second Circuit's conclusion is that it is arguably correct, but that is not a sufficient basis for the granting of habeas relief; 28 U.S.C. § 2254(d)(1) requires that the rule of law disregarded or misapplied by the state court have been "clearly established Federal law." It is far from "clearly established" that *Wampler* states a rule of constitutional law.

III. The Second Circuit Incorrectly Identified the Holding of *Wampler*.

Even assuming (1) that a lower federal court may determine, in the first instance, that a rule of law announced by this Court is, within the meaning of 28 U.S.C. § 2254(d)(1), a "clearly established" rule of federal constitutional law, and (2) that the Second Circuit correctly concluded that *Wampler* was based on the Constitution, the Second Circuit nevertheless erred in ruling that Earley would be entitled to habeas relief if his petition was timely. Lacking the guidance provided by this Court's subsequent decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006), the Second Circuit stated too

broadly the holding of *Wampler*.[5] When, in light of *Musladin*, the holding of *Wampler* is correctly stated, Earley's potential entitlement to habeas relief vanishes.

The underlying substantive issue in *Musladin* was whether the defendant was deprived of a fair trial when the court permitted members of the victim's family to sit in the front row of the spectators' section, wearing buttons with a photograph of the deceased victim. The California Court of Appeal rejected the defendant's claim that the buttons deprived him of a fair trial. On habeas review, however, the Ninth Circuit held that the state court's decision involved an unreasonable application of clearly established federal law, as determined by this Court. 127 S. Ct. at 652.

The Ninth Circuit identified two cases, *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), as the sources of the law that the California court had unreasonably applied. According to the Ninth Circuit, based on the holdings of those two cases, it was objectively unreasonable for the state appellate court to have found that the buttons were not inherently prejudicial to the defendant's right to a fair trial. *Musladin*, 127 S. Ct. at 652.

This Court vacated the judgment of the Ninth Circuit. This Court observed that in contrast to both *Williams* and *Flynn*, which dealt with government-sponsored practices during a trial, the wearing of buttons in the *Musladin* case involved the conduct of spectators. This Court stated that it had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id.*

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[5] *Musladin* was decided on December 11, 2006. The Second Circuit decided *Earley* on June 9, 2006, denied panel rehearing on August 31, 2006, and denied rehearing en banc on November 27, 2006.

Accordingly, this Court held:

> Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No *holding* of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here.

Id. at 654 (emphasis added).

Thus, *Musladin* emphatically reaffirmed that only the holdings of this Court enter into the question of whether the state courts unreasonably applied federal law. Additionally, this Court characterized narrowly the holdings of the decisions that it was analyzing—drawing a distinction between what the Court had *held* in those decisions and what it merely had stated in those decisions (*id.* at 653)—and characterized narrowly the set of circumstances to which those holdings necessarily applied, drawing a distinction between government-sponsored action and private action. Finally, this Court stated that where its holdings had not addressed a particular set of circumstances, then the refusal of the state courts to extend its holdings to cover that set of circumstances could not be contrary to or an unreasonable application of clearly established federal law. *Id.* at 653-54; *cf. Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) ("Section 2254[d][1] would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law").

Consequently, the overall approach endorsed in *Musladin* is to treat the holdings of prior decisions of this Court as closely tethered to the particular circumstances of the cases in which those holdings were announced—

and to reject a more expansive approach to what is "clearly established Federal law." *See also Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (per curiam) (decision of this Court, *Faretta v. California*, 422 U.S. 806 [1975], establishing a right to self-representation, did not say anything about any specific legal aid the State owes a *pro se* criminal defendant; hence, Ninth Circuit erred in holding, based on *Faretta*, that a violation of a law library access right is a basis for federal habeas relief).

Considered in light of the approach taken by this Court in *Musladin*, the holding of *Wampler* is this: "The choice of pains and penalties, *when choice is committed to the discretion of the court*, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment." 298 U.S. at 464 (emphasis added). *Wampler* turns on the circumstance that, under the law at the time, the judge had the *option* to continue the defendant's incarceration until his fine was paid, and that if the judge did not exercise that option, then the fine had to be collected in the same manner as any civil judgment. *Wampler* rejected the notion that, where a sentence entailed an exercise of discretion, a court functionary could exercise that discretion, because the exercise of sentencing discretion was inherently a judicial function.

Wampler did not purport to answer the question whether, when a particular penalty was *not* committed to the discretion of the court, but instead was *mandated* by statute, nevertheless the imposition of that penalty would be exclusively a judicial function, and that, as such, it would need to be expressed by the judge at sentencing. Indeed, the Second Circuit itself acknowledged that the discretionary character of the penalty at issue in *Wampler* distinguished *Wampler* from this case:

> We recognize differences between the facts of *Wampler* and those before us. In *Wampler*, the decision whether to keep the defendant in custody pursuant to a fine was, by law, within the discretion of the sentencing judge. Here, by contrast, state law required that Earley be sentenced to a PRS term.

(App. at 6a). 451 F.3d at 74.

The Second Circuit nonetheless thought that the determination of the state court was "contrary to" *Wampler* because of the "broader holding" of *Wampler* that "[t]he judgment of the court established a defendant's sentence, and that sentence may not be increased by an administrator's amendment" (App. at 7a). 451 F.3d at 75. Setting aside the question of whether the Second Circuit was correct in characterizing Earley's sentence as having been increased by an administrator's amendment, the Second Circuit was clearly incorrect, in light of *Musladin*, in relying on *Wampler*'s so-called broader holding.

Musladin eschews the very concept of a "broader holding" when a Supreme Court decision can be understood on the basis of a narrow holding. *Compare Musladin*, 127 S. Ct. at 651-54 (opinion of the Court) *with id. at 656* (Kennedy, J., concurring in the judgment) *and id. at 657-58* (Souter, J., concurring in the judgment). Because *Wampler* did not have to address the question of whether a clerk's amendment to a sentence would be permissible when (as in this case) the amendment—if in fact it was an amendment—was mandated by statute, the language in *Wampler* addressing the invalidity of the order of commitment as a means of establishing the sentence is dictum.

Accordingly, because no *holding* of this Court required the New York State court to apply *Wampler* to

the circumstances of this case, the determination of the state court, that Earley was not entitled to have the PRS component of his sentence stricken from the sentence, was not "contrary to" *Wampler.*

Therefore, for all of these reasons, this Court should grant a writ of certiorari to resolve the important questions of AEDPA interpretation presented by this case. At the very least, a writ of certiorari should be granted, the judgment of the Second Circuit should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *Musladin.*

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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April 25, 2007

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2005

(Argued: January 25, 2006 Decided: June 9, 2006)

Docket No. 04-4098-pr

SEAN EARLEY,

Petitioner-Appellant,

—v.—

TIMOTHY MURRAY,

Respondent-Appellee.

Before:

WALKER, *Chief Judge*,
LEVAL and SOTOMAYOR, *Circuit Judges*.

Appeal from a decision of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) denying Petitioner-Appellant's petition for a writ of habeas corpus.

VACATED and REMANDED.

DAVID SAMEL, New York, New York, *for Petitioner-Appellant.*

AMY APPELBAUM, Assistant District Attorney (Charles J. Hynes, District Attorney, Kings County, Leonard Joblove and Victor Barall, Assistant District Attorneys, *on the brief*), Brooklyn, New York, *for Respondent-Appellee.*

JOHN M. WALKER, JR., *Chief Judge*:

Petitioner-Appellant Sean Earley was sentenced to six years' incarceration pursuant to a plea agreement. Unbeknownst to Earley, his counsel, the prosecutor, and the sentencing judge, New York had recently passed a law mandating a term of post-release supervision ("PRS") for convictions such as Earley's. Subsequently, the New York Department of Correctional Services ("DOCS"), without informing Earley, administratively added a five-year PRS term to Earley's sentence. More than a year later, upon learning of this addition to his sentence, Earley moved in state court to have the sentence amended to reflect the plea agreement by removing any term of supervision. After the state courts denied his motion and his appeal, Earley filed a petition for a writ of habeas corpus in the Eastern District of New York. The district court (Edward R. Korman, *Chief Judge*) denied Earley's petition. This court granted a certificate of appealability, and we now vacate the district court's decision and remand the case.

BACKGROUND

In February 2000, Sean Earley pleaded guilty to attempted burglary in the second degree. Pursuant to the plea agreement between Earley and the State of New York, he was sentenced to six years in prison. No term of post-release supervision following the six years of incarceration was included in the sentence announced in court by the judge, the written judgment, or the written order of commitment signed by the clerk of the Kings County Supreme Court. New York had recently passed a statute imposing a mandatory term of PRS that should have applied to Earley. *See* N.Y. Penal Law § 70.45 ("Each determinate sentence also includes, as a part thereof, an additional period of post-release supervision."). But as Earley, his counsel, the prosecutor, and the judge were not aware of the new law, Earley was not informed of this mandatory provision during plea negotiations, the plea allocution, or at the time his six-year sentence was imposed. Sometime between his sentencing in February 2000 and February 2002, DOCS administratively added a five-year term of PRS to Earley's sentence without informing Earley.

After hearing rumors from fellow inmates in October 2001 that DOCS had added periods of PRS to the sentences of certain inmates, Earley became concerned. He requested a statement of his sentence and transcripts of his plea and sentencing proceedings. Sometime in early February 2002, Earley says he received confirmation that a five-year PRS period had, in fact, been added to his sentence. The transcripts he received around the same time confirmed that no PRS period had been mentioned at either his plea or sentencing.

After exhausting his administrative remedies in an unsuccessful attempt to have the PRS term removed

from his sentence, Earley moved in state court pursuant to section 440.20 of the New York Criminal Procedure Law to be resentenced according to the terms imposed by the sentencing judge. *See* N.Y. Crim. Proc. Law § 440.20. He argued that the modification to his sentence violated his due process rights and that he had received ineffective assistance of counsel.

The state court denied Earley's motion. While acknowledging that Earley should have been told about the PRS term, the court found that, because the PRS term is mandatory under New York law, Earley's request to eliminate it from his sentence could not be granted. The state court also denied Earley's ineffective-assistance-of-counsel claim, finding that Earley had failed to demonstrate that he had suffered any prejudice as a result of his counsel's alleged errors. The Appellate Division denied leave to appeal.

Earley then filed a petition for a writ of habeas corpus in federal district court, again raising both due process and ineffective-assistance claims and again asking for the PRS term to be removed from his sentence. The district court initially dismissed the petition as untimely because Earley had not filed his petition within one year of his conviction. After Earley moved for a rehearing on the basis that he had not been permitted to reply to the state's submissions that raised the question of timeliness, the district court granted rehearing. It reconsidered its earlier ruling and again denied Earley's petition. The district court acknowledged that the timeliness issue would require a hearing to inquire into the date Earley first became aware of the addition to his sentence and went on to deny the petition on the merits. This court granted Earley's motion for a certificate of appealability with respect to his claims that (1) his due process rights were violated

and (2) he received ineffective assistance of counsel. This appeal followed.

DISCUSSION

This court reviews a district court's denial of a habeas corpus petition de novo. *Loliscio v. Goord*, 263 F.3d 178, 184 (2d Cir. 2001). Once a claim has been "adjudicated on the merits" by the state court, our review of the state court's decision is subject to the deferential standard set out in section 104(3) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254(d)). Under AEDPA, an application for a writ of habeas corpus may not be granted unless the state court's adjudication of the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The "contrary to" clause of section 2254(d)(1) is violated if the state court reaches a result opposite to the one reached by the Supreme Court on the same question of law or arrives at a result opposite to the one reached by the Supreme Court on a "materially indistinguishable" set of facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" of Supreme Court law occurs if the state court identifies the correct rule of law but applies that principle to the facts of the petitioner's case in an unreasonable way. *Id.* at 413. The question is whether the state court's application of clearly established federal law is objectively unreasonable, *id.* at 409, where objectively unreasonable means "some increment of incorrectness beyond error," *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000). Because Earley's claims were adjudi-

cated on the merits by the state court, AEDPA deference applies to those determinations.

Seventy years ago, the Supreme Court established that the sentence imposed by the sentencing judge is controlling; it is this sentence that constitutes the court's judgment and authorizes the custody of a defendant. *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936). In *Wampler*, a federal trial judge orally sentenced the petitioner to eighteen months in prison and a $5,000 fine. The clerk of the court, following a local practice known to the court, added the condition that the defendant remain in custody until his fine was paid. The Supreme Court held that the clerk did not have the power to alter the sentence imposed by the court, and therefore the added condition was void. Justice Cardozo, speaking for a unanimous Court, announced a basic principle of criminal sentencing: "The only sentence known to the law is the sentence or judgment entered upon the records of the court. . . . Until corrected in a direct proceeding, it says what it was meant to say, and this by an irrebuttable presumption." *Id.* at 464 (internal citations omitted). The Court went on to write that a "warrant of commitment [prepared by the clerk] departing in matter of substance from the judgment back of it is void. . . . 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.'" *Id.* at 465 (quoting *Biddle v. Shirley*, 16 F.2d 566, 567 (8th Cir. 1926)).

We recognize differences between the facts of *Wampler* and those before us. In *Wampler*, the decision whether to keep the defendant in custody pursuant to payment of a fine was, by law, within the discretion of the sentencing judge. Here, by contrast, state law required that Earley be sentenced to a PRS term. Early

in his analysis, Justice Cardozo noted this factor, writing that "[t]he choice of pains and penalties, *when choice is committed to the discretion of the court*, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment." *Id.* at 464 (emphasis added).

Had the Court stopped there, the holding of *Wampler* might extend only to those cases where punishment subsequently added to the defendant's sentence by administrative personnel relates to a matter within the court's discretion; it might have no application to a case such as ours, which involves a mandatory provision. But *Wampler* went on to articulate a broader holding: The judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment. *Wampler* thus provides clearly established Supreme Court precedent supporting Earley's claim. *See also Greene v. United States*, 358 U.S. 326, 329 (1959) (quoting *Wampler*'s assertion that "the only sentence known to the law is the sentence or judgment entered upon the records of the court"); *Johnson v. Mabry*, 602 F.2d 167, 170 (8th Cir. 1979). The only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect.

The sentence imposed by the court on Earley was six years in prison. The judgment authorized the state to incarcerate him for six years and no more. Any addition to that sentence not imposed by the judge was unlawful. Yet Earley was subjected to further custody. Post-release supervision, admitting of the possibility of revocation and additional jail time, is considered to be "custody." *See Jones v. Cunningham*, 371 U.S. 236, 240-43 (1963) (holding that parole satisfies the "in

custody" requirement of habeas petitions); *Peck v. United States*, 73 F.3d 1220, 1224 n.5 (2d Cir. 1995) (holding that supervised release satisfies the "in custody" requirement of habeas petitions). Earley was released from prison in 2004 but was reincarcerated for violating the terms of his PRS and is currently in prison.

Earley's imprisonment was authorized not by the sentence as calculated by DOCS but by the judgment of the court. *See Wampler*, 298 U.S. at 465 ("The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence." (citation and internal quotation marks omitted)); *see also United States v. A-Abras Inc.*, 185 F.3d 26, 29 (2d Cir. 1999) (holding that the written judgment of commitment is simply evidence of the oral sentence); *United States v. Marquez*, 506 F.2d 620, 622 (2d Cir. 1974) (holding that the oral sentence constitutes the judgment of the court and that it is that sentence that provides the authority for the execution of the sentence); *Kennedy v. Reid*, 249 F.2d 492, 495 (D.C. Cir. 1957) (same); *Wilson v. Bell*, 137 F.2d 716, 721 (6th Cir. 1943) (same); *Hode v. Sanford*, 101 F.2d 290, 291 (5th Cir. 1939) (same). If, as in *Wampler*, an erroneous order of commitment prepared by the clerk of court with the court's knowledge cannot alter the sentence imposed by the court, then plainly a later addition to the sentence by an employee of the executive branch cannot do it. Only the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person's liberty. *Wampler*, 298 U.S. at 464 ("In any collateral inquiry, a court will close its ears to a suggestion that the sentence entered in the minutes is something other than the authentic expression of the sentence of the judge."). The state

court's determination that the addition to Earley's sentence by DOCS was permissible is therefore contrary to clearly established federal law as determined by the United States Supreme Court.[1]

The state contends that a five-year PRS was mandated by statute and therefore necessarily part of Earley's sentence by operation of law. We disagree. *Bozza v. United States*, 330 U.S. 160 (1947), upon which the state relies, provides that a sentencing court may increase a defendant's sentence when it has omitted a mandatory component of that sentence without running afoul of the Double Jeopardy Clause, *id.* at 166-67, but that case does not contemplate allowing the increase to take place other than at a resentencing proceeding. In anticipation of such errors, and consistent with *Bozza*, New York law provides the appropriate remedy: If an inmate has received an illegal sentence, the state may move to have the offending sentence vacated and the defendant resentenced by a judge. *See* N.Y. Crim. Proc. Law § 440.40. Section 440.40 provides, in relevant part, that "[a]t any time not more than one year after the entry of a judgment, the court in which it was entered may, upon motion of the people, set aside the sentence upon the ground that it was invalid as a matter of law." *Id.* § 440.40(1). The defendant and his counsel must be

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[1] Although *Wampler* does not identify the source of the rule that it announces, we believe that it is based in the due process guarantees of the United States Constitution. *Wampler* does not hold that the defendant *could* not have been sentenced to the punishment that the state attempts to impose on him. It simply recognizes that he *was* not sentenced to that punishment. Any deficiency in the sentence could have been corrected through the proper procedures. The Supreme Court thus recognizes that procedural requirements in sentencing demand that a sentence must be imposed by a judge, on the record, in court.

informed of such a motion and given an opportunity to appear in opposition to the motion. *Id.* § 440.40(4). If the court grants the people's motion, it must then resentence the defendant in accordance with the law. *Id.* § 440.40(5).

Thus, when DOCS discovered the oversight made by Earley's sentencing judge, the proper course would have been to inform the state of the problem, not to modify the sentence unilaterally. The state then could have moved to correct the sentence through a judicial proceeding, in the defendant's presence, before a court of competent jurisdiction. *See Wampler*, 298 U.S. at 464 ("If the [order of commitment] is inaccurate, there is a remedy by motion to correct it to the end that it may speak the truth.").

New York's Department of Correctional Services has no more power to alter a sentence than did the clerk of the court in *Wampler*. Earley's sentence was therefore never anything other than the six years of incarceration imposed on him by the judge at his sentencing hearing and recorded in his order of commitment. The additional provision for post-release supervision added by DOCS is a nullity. The imposition of a sentence is a judicial act; only a judge can do it. The penalty administratively added by the Department of Corrections was, quite simply, never a part of the sentence.

Because we find that clearly established Supreme Court precedent renders the five-year PRS term added to Earley's sentence by DOCS invalid, we vacate the district court's judgment and remand the case for that court to determine whether Earley's petition for a writ of habeas corpus was timely filed. Should the district court determine that the petition was timely, it is instructed to issue a writ of habeas corpus excising the term of post-release supervision from Earley's sen-

tence and relieving him of any subsequent penalty or other consequence of its imposition. Our ruling is not intended to preclude the state from moving in the New York courts to modify Earley's sentence to include the mandatory PRS term.[2] Because we have determined that New York's modification of Earley's sentence violates clearly established federal law and requires us to grant his habeas petition in the event the petition was timely, we need not consider Earley's claim that his counsel was ineffective.

CONCLUSION

The judgment of the district court is vacated and the case remanded for further proceedings consistent with this opinion.

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[2] It is not clear whether such a motion could be made at this time under New York law, which appears to require such motions to be filed within one year of the entry of judgment. N.Y. Crim. Proc. Law § 440.40. Any such questions will be for the New York courts to decide in the event such an application is made.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2005

(Argued: January 25, 2006 Decided: June 9, 2006)

Docket No. 04-4098-pr

ON PETITION FOR REHEARING

(Filed: June 22, 2006 Decided: August 31, 2006)

SEAN EARLEY,

Petitioner-Appellant,

—v.—

TIMOTHY MURRAY,

Respondent-Appellee.

Before:

WALKER, *Chief Judge*,
LEVAL and SOTOMAYOR, *Circuit Judges*.

Petition for rehearing from a decision of the United States Court of Appeals for the Second Circuit (John M. Walker, Jr., *Chief Judge*) vacating the judgment of the United States District Court for the Eastern District

of New York, which denied petitioner-appellant Sean Earley's petition for a writ of habeas corpus.

DENIED.

DAVID M. SAMEL, New York, New York, *for Petitioner-Appellant.*

AMY M. APPELBAUM, Assistant District Attorney (Charles J. Hynes, District Attorney, Kings County, Leonard Joblove and Victor Barall, Assistant District Attorneys, *on the brief*), Brooklyn, New York, *for Respondent-Appellee.*

JOHN M. WALKER, JR., *Chief Judge*:

For the reasons stated below, respondent-appellee Timothy Murray's petition for rehearing is denied.

Respondent-appellee petitions for rehearing of a June 9, 2006, opinion of this court vacating the judgment of the United States District Court for the Eastern District of New York denying petitioner-appellant Sean Earley's petition for a writ of habeas corpus. Respondent-appellee argues that rehearing in this case is warranted because this court's decision (1) was based on an inaccurate understanding of the operation of New York law and (2) will call into question the validity of the post-release supervision ("PRS") elements of numerous sentences. Upon review, we adhere to our view that the inclusion of a five-year period of PRS in Earley's sentence when that PRS was not included in the sentence imposed at Earley's

sentencing hearing violated his rights under the Due Process Clause of the United States Constitution.

Respondent-appellee insists that our original decision failed to recognize that New York law automatically includes a period of PRS in every determinate sentence. He further argues that, by virtue of the fact that every determinate sentence, by definition, includes such a period, Earley's PRS was part of his judicially-imposed sentence through the operation of New York law as soon as he was sentenced to a determinate sentence. In other words, respondent-appellee believes that a judicially-imposed sentence consists of two elements: (1) the terms imposed by the sentencing judge and (2) whatever additional terms that pronouncement is defined to include under New York law. As a result, respondent-appellee argues that the insistence of *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), on which we relied in our original opinion, that the only cognizable sentence is the one imposed by the judge has no effect on Earley's PRS term; the sentence imposed by the judge did, in fact, include a term of PRS by operation of New York law. That this argument is cleverly formulated, we do not deny; nevertheless, we must reject it. A judicially-imposed sentence includes only those elements explicitly ordered by the sentencing judge.

Wampler undeniably stands for the proposition that the only valid terms of a defendant's sentence are the terms imposed by the judge. Indeed, the facts of *Wampler* compel this interpretation. In that case, the judge orally imposed a sentence on the defendant. The clerk of the court then altered the terms of that sentence when preparing the written judgment. *Id.* at 461-62. It was this alteration that the Supreme Court held to be null and void, stating that "[t]he only sen-

tence known to the law is the sentence or judgment entered upon the records of the court." *Id.* at 464. Thus, the only sentence known to the law is the sentence imposed by the judge; any additional penalty added to that sentence by another authority is invalid, regardless of its source, origin, or authority until the judge personally amends the sentence. Thus, contrary to respondent-appellee's contention, a sentence cannot contain elements that were not part of a judge's pronouncement. The fact that New York law mandates a different sentence than the one imposed may render the sentence imposed unlawful, but it does not change it. The sentence imposed remains the sentence to be served unless and until it is lawfully modified.

The analysis in *Bozza v. United States*, 330 U.S. 160 (1947) supports the point. In that case, the trial judge had failed to impose a mandatory fine at sentencing. *Id.* at 165. Several hours after the original sentence had been announced, the judge recalled the prisoner and imposed the mandatory fine. *Id.* The Supreme Court, in rejecting the argument that the defendant had twice been placed in jeopardy, never suggested that a defendant's sentence could be corrected to include a term mandated by statue without a judge imposing it. *See id.* at 166-67. To the contrary, the Court noted that when a trial court imposes a sentence that is unlawful because it is excessive, the proper procedure is "an appropriate amendment of the invalid sentence by the court of original jurisdiction." *Id.* at 166. *Wampler*, although not cited in *Bozza*, compels nothing less here.

Respondent-appellee accurately observes that our original opinion reflected our belief that the judge's failure to mention the PRS term at Earley's sentencing was an "oversight." *Earley v. Murray*, 451 F.3d 71, 76 (2d Cir. 2006). But that belief had no impact on our

analysis. When a judge fails to impose a custodial element of a sentence, that element is not a part of the sentence, regardless of whether that failure was due to oversight or to customary practice.

Respondent-appellee also quibbles with our assertion that Earley's sentence was altered by DOCS. Instead, he argues that the PRS term was included as soon as Earley received his determinate sentence. Again, this disagreement with our characterization of the facts has no effect on the reasoning or outcome of our original opinion. When the sentence as imposed by the sentencing judge is purportedly altered to reflect something other than the sentence imposed, the source of that alteration is immaterial. Whether it is DOCS administrators or the operation of New York law that works the alteration, the alteration is of no effect. As we stated in our original decision "[o]nly the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person's liberty." *Earley*, 451 F.3d at 75. And that judgment includes only those terms expressly imposed.

In sum, respondent-appellee's argument that the PRS term was "imposed" at sentencing because it was always part of the determinate sentence handed down by the judge is simply incorrect. Whatever conceptualization respondent-appellee has about the function of New York Penal Law sections 70.00 and 70.45, they cannot operate to undermine protections contained in the Federal Constitution. And as *Wampler* requires the custodial terms of sentences to be explicitly imposed by a judge, any practice to the contrary is simply unconstitutional and cannot be upheld.

Respondent-appellee indicates that New York courts regularly fail to inform defendants of mandatory PRS terms but consider them part of those defendants'

sentence nonetheless. As a result, our decision may call into question the validity of the PRS components of numerous sentences. We nonetheless adhere to our ruling.

For the reasons set forth above, the petition for rehearing is hereby DENIED.

[LETTERHEAD OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT]

Filed November 27, 2006

Date:	
Docket Number:	04-4098-pr
Short Title:	Earley v. Murray
DC Docket Number:	03-cv-3104
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Edward Korman

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of November two thousand six.

Docket No. 04-4098-pr

SEAN EARLEY,

Petitioner-Appellant,

—v.—

TIMOTHY MURRAY,

Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Timothy Murray. Upon consideration by the panel that

decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ TRACY W. YOUNG

Motion Staff Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

03-CV-3104 (ERK)

SEAN EARLY,

Petitioner,

—against—

TIMOTHY MURRAY, SUPT.,

Respondent.

MEMORANDUM AND ORDER

Korman, Ch. J.,

The petition is dismissed because it was not timely filed. Moreover, turning to the merits, I agree with petitioner that the period of post-release supervision is a direct consequence of his sentence of which he should have been advised before entering a plea of guilty. Nevertheless, I agree with the District Attorney that "it was entirely reasonable for the state court to reject defendant's claim where defendant explicitly stated that he did not want the only appropriate remedy [under New York Law]—vacatur of his conviction—were it determined that his claim had merit." D.A. Memo at p. 7.

The petition is denied. I also deny a certificate of appealability.

SO ORDERED:

/s/ EDWARD R. KORMAN
Edward R. Korman
United States Chief District Judge

Brooklyn, New York
December 31, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

03-CV-3104 (ERK)

SEAN EARLY,

Petitioner,

—against—

TIMOTHY MURRAY, SUPT.,

Respondent.

MEMORANDUM AND ORDER

Korman, Ch. J.,

On December 31, 2003, I denied the petition for a writ of habeas corpus in a short Memorandum and Order that reads as follows:

> The petition is dismissed because it was not timely filed. Moreover, turning to the merits, I agree with petitioner that the period of post-release supervision is a direct consequence of his sentence of which he should have been advised before entering a plea of guilty. Nevertheless, I agree with the District Attorney that "it was entirely reasonable for the state court to reject defendant's claim where defendant explicitly stated that he did not want the

> only appropriate remedy [under New York Law]—vacatur of his conviction—were it determined that his claim had merit." D.A. Memo at p. 7.

Petitioner has filed a motion for rehearing alleging among other grounds that the petition was decided before he had an opportunity to reply to the response of the District Attorney. By inadvertence, I did decide the petition before petitioner time to reply expired. This ground justifies granting the motion for rehearing, although I again deny the petition.

1. While it is undisputed that the five-year period of post-release supervision was mandatory, petitioner argues that New York law did not preclude vacating the period of post-release supervision in the circumstances here. The strongest authority he cites for that proposition is dictum in a footnote of an Appellate Division case. *People v. Melio,* 304 A.D.2d 247, 250, n. 1 (2d Dep't 2003). By contrast there are clear holdings of the Appellate Division to the contrary. *People v. Cass,* 301 A.D.2d 681 (3d Dep't 2003; *People v. Housman,* 291 A.D.2d 752 (3d Dep't 2002); *see also People v. Catu,* 2 A.D.3rd 306 (1st Dep't 2003) distinguishing *People v. Rosenthal,* 305 A.D. 327 (1st Dep't 2003), upon which petitioner relies, on the ground that the sentence in *Rosenthal* was reduced "because the circumstances indicated it was excessive and not because defendant was not advised of post-release supervision." Moreover, the issue here is whether the remedy available to petitioner and rejected by him, constituted an unreasonable application of clearly established Supreme Court law.

Petitioner relies principally on the holding of the Supreme Court in *Santobello v. New York,* 404 U.S. 257 (1971), which addresses the relief to which a defendant is entitled for breach of a promise in a plea agreement.

This issue, however, "is a matter of some uncertainly for while the Supreme Court was unequivocal in ruling in *Santobello v. New York* that there was a constitutional right to relief, that decision is less explicit on the constitutional source of that holding and on what remedy is required under what circumstances." LaFave, Israel and King *Criminal Procedure* (2d. Ed.) § 21.2(e) at 83. This is particularly true "as to those cases in which the promise which was made by the prosecutor or some other agent of the state is 'unfulfillable' in the sense that it is a commitment to produce a result not authorized by law or beyond the power to produce." Id. at § 21.2(e) at 90 and the cases cited in footnote 242; *United States v. Story*, 891 F2d 988, 947 (2d Cir. 1989) ("Since the District Court lacked authority to choose a Pre-Guidelines Sentence, the option of withdrawing the plea is the only remedy.")

Moreover, in this case there were no promises made one way or another with respect to the issue of post-sentence release. Both sides appeared to proceed ignorance of a newly amended provision of law that required a mandatory period of five years post-sentence release. Significantly, in rejecting petitioner's ineffective assistance of counsel claim, because of the failure of counsel to advise petitioner of the mandatory post-sentence release period, the § 440.10 judge wrote.:

> Finally with respect to defendant's ineffective assistance of counsel claim, the defendant has failed to show that he would have insisted on going to trial if not for defense counsel's alleged error (*People v. Rodriguez*, 188 A.D.2d 623) . . ."

Pet. App. Ex. C at p. 3.

Petitioner did not allege in his § 440.10 application that, if he had known that a five year period of post-

supervised release would be imposed, he would not have pled guilty. Pet. App. Ex. D. (Affidavit) p. 8 ¶ 26. Nor did he do so in his application for leave to appeal to the Appellate Division. Pet. App. B. (Memo of Law) at pp. 15-16). Indeed, even if he had made such a claim, it would be impossible to credit it. Petitioner did not dispute the District Attorney's suggestion that he was the beneficiary of a "good bargain" Pet. App. Ex. F at 2. Based on over thirty years of experience in the criminal justice system, I have never heard of a plea bargain agreement being rejected by a defendant because of the possibility of post-supervised release. The only concern of defendants when they plead is understandably how much time they will serve behind bars. See *People v. Melio*, 304 A.D.2d 247, 250 (2d Dep't 2003) ("One may assume that, generally a defendant is most concerned with the period of incarceration and not the period of supervised released.")

Petitioner did allege, generally, although not in relation to his ineffective assistance of counsel claim, that he had been "aware that his sentence was actually five years more than he was told if he would have elected to go to trial. In the least movant would have been able to negotiate a better bargain." Pet. Ex. D (Affidavit) p. 15 ¶ 43. I accept that petitioner would not have pled guilty in return for a promise that he would serve eleven years in jail instead of six years. The sentence here, however, was not five years more than he was told he would serve. No one could possibly equate post-supervised release with a comparable period of incarceration.

Petitioner argues that his remedy should not be limited to the withdrawal of his plea because he had served the "vast majority of the prison time by the time he found out about the illegal PRS term." Motion to Amend or Alter Judgment at p. 6. The record indicates, however,

that petitioner pled guilty on February 17, 2000 and was sentenced to a six-year term of imprisonment on February 29, 2000. Petitioner claims to have learned about the post-sentence release period on October 5, 2001, Pet. Memo at 11, some nineteen months later. Moreover, the record also indicates that the first year of petitioner's sentence was being served concurrently with a one-year current sentence for another offense, Pet. App. Ex G. p.7, and that petitioner was on bail for a part of the time preceding his plea. Pet. Memo at p. 2. Under these circumstances, while petitioner may have served all or a substantial part of his sentence by this point, it does not appear to have been the case when he first learned about the post-release supervision. Indeed, as of the date of the filing of the petition, June 16, 2003, petitioner had over two years remaining in his sentence before his maximum release date, July 27, 2005, although he was eligible for parole earlier. Pet. App. J.

Of course, it is true that petitioner did serve a part of his sentence before he learned of the mandatory post-release supervision and that the withdrawal of the plea could not have restored him precisely to the *status quo ante*. Nevertheless, it was not unreasonable for the New York courts to conclude, under all of the circumstances, that withdrawal of his plea was the appropriate remedy. Indeed, petitioner's failure to establish that he would have insisted on going to trial if he had known of the mandatory period of post-release supervision, should be sufficient alone to dispose of his claim of that he is entitled to the relief he seeks based on the alleged breach of the plea agreement. Setting aside the fact that the issue of post-release supervision was not discussed in the plea agreement, the breach could not be viewed as material unless it would have caused petitioner to have insisted on going to trial. See *People v. Catu*, 2 A.D.3d 306

(203) [sic] (defendant not entitled to relief where record shows that "knowledge of the post-release supervision component of the sentence would not have affected defendant's decision to plead guilty"); *People v. Melio,* 304 A.D.2d 247, 250 (2d Dep't 2003) (same).

2. Petitioner also argues that his petition was timely filed. The claim of timeliness is based on the accuracy of his claim that he did not learn about the post-release supervision until October 5, 2001. Motion to Alter or Amend Judgment at 19. Under this premise, petitioner had, according to *his* calculation, seventy-seven days as of May 27, 2003 to file his petition. Pet. Memo at pp. 2-3. The petition was "completed" on June 16, 2003. Thus, the petition was filed only fifty-seven days prior to the expiration of the one year period. Petitioner's claim of equitable tolling depends on the credibility of his allegation regarding the date when he learned about the PSR. The timeliness issue should not have been resolved without a hearing. Pet. App. Ex. J. The alternative basis for my initial ruling makes such a hearing unnecessary.

3. Petitioner also asserts that I should have recused myself because my wife is an Assistant District Attorney in Kings County. Motion to Alter or Amend Judgment at p. 2-3. This fact was disclosed to petitioner in the order to show cause issued after the petition was filed. The notice reads as follows:

> ***Note:*** The parties are advised that my wife is an Assistant District Attorney in the Appeals Section of the Kings County District Attorney's office. While this circumstance would not affect my ability to decide the petition fairly and impartially, if any party wishes me to recuse myself for this reason, I will do so. *The District Attorney is directed to notify*

me if my wife ever worked on the case. If so, I will recuse myself even if the parties do not seek my recusal.

Petitioner did not ask me to recuse myself until after I denied the petition. Moreover, his claim that my recusal was required is wrong. See *Committee on Codes of Conduct of the Judicial Conference of the United States*, Advisory Opinion No. 38 a copy of which is annexed hereto. While the foregoing opinion related to a comparable relationship between a judge and an Assistant United States Attorney, it is clearly applicable in the present context as well. Nor is any truth to petitioner's suggestion that the Assistant District Attorney who appears in the present case is a personal friend of mine or my wife. Like many lawyers who appear before me, my relationship with her consists of an exchange of pleasantries when we run into each other on the street or in the courthouse.

The motion for rehearing is granted. On rehearing the petition is denied.

SO ORDERED:

/s/ EDWARD R. KORMAN

Edward R. Korman
United States Chief District Judge

Brooklyn, New York
June 18, 2004

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 38

Disqualification of a Judge Whose Child is an Assistant United States Attorney.

A judge in a large, multi-judge district has requested an advisory opinion as to whether the judge would be disqualified from hearing all cases in which the United States was represented by any member of the United States attorney's office if the judge's child accepts a position as an assistant United States attorney. The child, of course, intends neither to appear before the judge nor to perform any services in cases assigned to the judge. Further, the court operates under an individual calendar system.

Canon 3C(1)(d), Code of Conduct for United States Judges, provides in part:

> C. *Disqualification.*
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including, but not limited to instances in which:
>
> * * *
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:
>
> * * *
>
> (ii) is acting as a lawyer in the proceeding;
>
> . . . .

The Commentary under subsection (d) provides:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require the judge's disqualification.

The latter part of this Commentary would not operate to disqualify the judge in question. First, the judge's child would not have an "interest" in the United States attorney's office as that word is used in the Commentary. Second, the United States attorney's office is not a law firm. And, third, that office is ordinarily not "substantially affected by the outcome of the proceeding."

The official notes to the 1973 ABA Code of Judicial Conduct explain on Page 63:

> The Commentary clarifies the status of a judge who was formerly a lawyer in a governmental agency. An agency—for example, the Justice Department—is not fully equated with a private law firm, in that a former agency lawyer is not considered to have been associated with all other lawyers in the agency. If the former agency lawyer, now a judge, served as a lawyer in the matter in controversy, he is disqualified. The judge is disqualified also if his association with an agency lawyer now before the court or his association with the matter in controversy leads to the conclusion that, under the general stan-

> dard of Canon 3C(1), his impartiality might reasonably be questioned. The general standard should be considered also when a former associate or partner in a private law firm is a lawyer in the proceeding before a judge. Can the judge's impartiality reasonably be questioned because of the former association?

See Thode, *Reporter's Notes to Code of Judicial Conduct* 63 (ABA 1973).

The last question is raised here, specifically, "Can the judge's impartiality *reasonably* be questioned because the judge's child is an assistant United States attorney?" It does not seem *reasonable* to do so in view of the unique nature and obligations of the United States attorney's office, which does not represent clients, as do private law firms, but rather, the public interest.

The distinction between the United States attorney's office and a private law firm was recognized in *Berger v. United States*, 295 U.S. 78, 88 (1934), where the United States Supreme Court said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

In view of this basic distinction, it would seem unreasonable to question the judge's impartiality merely because the judge's child happened to be an assistant United States attorney.

The gravest problem is presented by the need to avoid the appearance of partiality. In view of the court's individual assignment calendar, it will be possible to avoid the appearance that the judge's child may have inadvertently worked on briefs or investigations in cases heard before the judge.

If the judge has been on the bench for a number of years or if he or she is a close friend of one or more members of the bench, an additional problem may arise relating to the child's appearance before the judges of the court. This problem, however, is no different from that encountered when a judge's son or daughter is with a private law firm and must appear before other members of a court. Just as in those other instances, the problem of avoiding the appearance of partiality in this instance must be dealt with depending upon the individual relationships between the child and the judge's colleagues.

August 1, 1974
Revised July 10, 1998

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM, PART 1C-A

BY: MICHAEL A. AMBROSIO, AJSC

DATE: MARCH 4, 2003

IND. NO.: 6183-1999

PEOPLE OF THE STATE OF NEW YORK,

—VS.—

SEAN EARLEY,

DEFENDANTS.

DECISION AND ORDER

On February 17, 2000, defendant, a predicate felon, entered a guilty plea to attempted burglary in the second degree (PL §§ 110/140.25[2]), a class D violent felony, in return for a promised determinate sentence of six years to run concurrent with two misdemeanors cases. Defendant was sentenced on February 29, 2000 in accordance with the plea arrangement. It is not in dispute that at the time of defendant's guilty plea, the court did not

appraise [sic] defendant of the fact that he would be required to submit to a statutorily-mandated five-year period of post-release supervision (see, PL § 70.45[1]).

Pursuant to CPL § 440.20, defendant has filed a pro-se motion, asking this court to vacate the sentence and re-sentence him to a determinate sentence of six years without the five-year period of post-release supervision, or in the alternative, vacate the sentence and re-sentence him to a five-year determinate sentence with the five year period of post-release supervision. Additionally, the defendant contends that his plea was not knowing and voluntary due to ineffective assistance of counsel in that his attorney also failed to inform him of the mandatory five-year post release supervision prior to his guilty plea. The people maintain that defendant's CPL § 440.20 motion is procedurally barred.

A period of post release supervision is automatically included in every determinate sentence "as part thereof" (PL § 70.45[1]). In *People v Goss*, 286 AD2d 180, the Appellate Division, Third Department concluded "that post-release supervision is a significant, punitive component of [a] defendant's sentence" (also see, *People v Alcock*, 188 Misc2d 284). Consequently, since *Goss*, allocations [sic] must include a reference to the post-release supervision component of the sentence.

The defendant did not move to withdraw his plea before sentencing nor did he timely seek to vacate the judgment of conviction (see, CPL § 440.10; *People v Velez*, — AD2d —; 2002 WL 31957436; *People v Wilson*, 296 AD2d 430). Rather, defendant has clearly expressed in his well-prepared brief that he wishes to retain the plea and have no aspect of the judgment modified other than his sentence. Specifically, defendant seeks to have the period of post-release supervision vacated or have the determinate sentence reduced from

six to five years with the five year period of post release supervision. In light of the mandatory nature of the post-release supervision, defendant's motion to vacate that component of the sentence must be denied (see, PL § 70.45[2], *People v Yekel*, 288 AD2d 762; *People v Cooney*, 290 AD2d 727; *People v Rawdon* 296 AD2d 599; *People v Housman*, 291 AD2d 665; *People v Lack*, — AD2d —; 2000WL31529050). Additionally, the failure to inform a defendant of the post-release component of a sentence does not, in and of itself, provide a basis for modifying the sentence pursuant to CPL § 440.20 (see e.g., *People v Cass*, — AD2d —; 2002WL31898148; *People v Lack, supra*).

Finally with respect to defendant's ineffective assistance of counsel claim, the defendant has failed to show that he would have insisted on going to trial if not for defense counsel's alleged error[1] (*People v Rodriguez*, 188 AD2d 623) nor has he shown his innocence or that had he gone to trial he would have been acquitted or received a lesser sentence (*People v Ahmtovic*, 157 AD2d 489, 490; *People v Alcock, supra*).

Accordingly, defendant's motion to set aside the sentence rendered by this court is hereby denied.

This constitutes the Decision and Order of the Court.

/s/ MICHAEL A. AMBROSIO
Michael A. Ambrosio

[1] The court also notes that defendant failed to supply an affidavit from his attorney in support of his motion. Where defendant claims he was deprived of the effective assistance of counsel, defendant's failure to supplement his own affidavit with one from his former attorney warrants denial of a CPL § 440.10 motion (*People v Taylor*, 211 AD2d 603; lv. den. 85 NY2d 281 [1995]; *People v Palma*, 224 AD2d 363, 364-365).

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